

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA MAE ALBER,

Plaintiff-Appellee,

v

CRAIG ALLEN ALBER,

Defendant-Appellant.

UNPUBLISHED
February 21, 2006

No. 257624
Mecosta Circuit Court
LC No. 01-014893-DO

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from the parties' judgment of divorce, challenging the trial court's property division. We affirm in part, reverse in part, and remand for further proceedings.

I

The general standards for reviewing the trial court's division of property in a divorce action were set forth in *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003):

In reviewing a trial court's property division in a divorce case, we must first review the trial court's findings of fact. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997), citing *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "If the trial court's findings of fact are upheld, [we] must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless [we are] left with the firm conviction that the division was inequitable." [*Draggoo, supra*] at 429-430, citing *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); see also *McNamara v Horner (After Remand)*, 255 Mich App 667; 662 NW2d 436 (2003).

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained by the trial court. *Id.* The trial court's disposition of marital property is intimately related to its findings of fact. *Id.*

A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Draggoo*, *supra* at 429. This Court gives special deference to a trial court's findings when based on the credibility of the witnesses. *Id.*

II

Defendant argues that the property division was inequitable and that the court erred in failing to articulate its findings of fact and conclusions of law on the factors specified in *Sparks*, *supra*. We disagree.

The trial court set forth its findings and conclusions in detail. As the court noted at the conclusion of trial, there were three-days of testimony and more than forty exhibits primarily focusing on the parties' property settlement disputes. The trial court's subsequent six-page written opinion appropriately addressed and resolved the disputed issues.

Given the factual findings, we are not left with a firm conviction that the property division was inequitable." *Draggoo*, *supra* at 429. The court properly considered the relevant factors in light of the evidence and the circumstances of this case. *Sparks*, *supra* at 159-160.

III

Defendant argues that the trial court improperly imposed a \$60,000 debt on the marital home. We disagree.

A court lacks jurisdiction in a divorce case "to compel a party to convey property or a property interest to a third person, even a child of the parties, or to adjudicate claims of third parties." *Reed v Reed*, 265 Mich App 131, 158; 693 NW2d 825 (2005) (citations omitted). The court's jurisdiction is limited to the dissolution of the marriage, and ancillary matters such as child support, spousal support, an equitable division of marital assets, and the award to one spouse of the other spouse's property in certain circumstances. *Id.*

In determining the joint debts acquired by the parties during the marriage, the trial court assessed a \$60,000 debt against the marital home on the basis that plaintiff's son built nearly three-fourths of the home. In its opinion, the court stated:

Builder – \$60,000 (Defendant husband has admitted that Plaintiff's son built $\frac{3}{4}$ of the house. Without the work of the son, the marital home would not exist. Therefore, it is a valid debt to the marriage. In her pretrial statement, the plaintiff stated the debt to be \$60,000. The building was over the course of two years. At thirty thousand a year, this is an appropriate figure. Therefore, it is ruled there will be a \$60,000 debt attached to the house.)

The court stated that this debt was the responsibility of plaintiff. In calculating the property settlement, the court subtracted the debts assigned to plaintiff from the value of the assets awarded to plaintiff and divided the marital estate accordingly.

Contrary to defendant's argument, we disagree that the trial court improperly adjudicated the rights of a third party. The trial court's decision pertained only to the division of the parties' assets and did not improperly adjudicate a third party complaint, *Smela v Smela*, 141 Mich App 602, 603-605; 367 NW2d 426 (1985) or order payment to a third party, *Hoffman v Hoffman*, 125 Mich App 488, 490; 336 NW2d 34 (1983). The trial court determined the debt to plaintiff's son for the purpose of adjudicating a fair and equitable division of the marital property. *Reed, supra* at 158.

The trial court's finding is supported by the evidence and is not clearly erroneous. Plaintiff asserted that a debt of \$60,000 to \$68,000 was owed on the house, which was her calculation of the amount due to her son David,¹ who spent approximately eighty hours a week over two years, building the house. Plaintiff testified that in exchange for building the house, defendant promised David the tools used, which were mostly plaintiff's, fifty percent of the parties' assets upon their deaths,² and payment of his college costs;³ however, defendant paid David's college cost only once, by a check for approximately \$2,500, which was equal to the tax benefits the parties received. Plaintiff testified in detail concerning the work David performed on the home and the tools used. Plaintiff testified that \$68,000 was the estimated labor cost that she obtained from two different builders for the work by David.

David testified that he was to receive fifty percent of the parties' estate when they died in exchange for his labor on the house. Further, defendant promised to give David all the tools used. He admitted that defendant never promised him a specific wage.

Defendant denied promising David any consideration for building the home, and stated that he told David only that he could use the tools in the future. This disputed issue was a matter for decision by the trial court. There was evidence to support the court's finding. We find no clear error, particularly since this involves a matter of witness credibility. MCR 2.613(C); *Beason, supra* at 805; *Draggoo, supra* at 429.

Defendant further argues that the court erred in assessing the \$60,000 debt because any payment due David for building the home is unenforceable pursuant to MCL 339.2412(1). Compensation for construction of a residential building is governed by statute, which requires a builder to be licensed to collect. Specifically, MCL 339.2412(1) provides that

[a] person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for

¹ According to the testimony, David started building the home right after he graduated from high school, when he was eighteen or nineteen years of age.

² A purported will executed by defendant on January 18, 2000, admitted into evidence, stated that David and Karen Klassen, plaintiff's daughter, could sell the property at anytime and divide the money in equal amounts.

³ According to plaintiff, defendant also promised at two other times to pay for David's college in exchange for commitments from David.

the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

In construing § 2412(1), our Supreme Court has held that an unlicensed contractor has no legal right to bring or maintain an action for compensation against landowners. *Stokes v Millen Roofing Co*, 466 Mich 660, 673; 649 NW2d 371 (2002). Moreover, a court may not grant equitable relief to circumvent a statute or avoid unduly harsh application of the statute. *Id.* at 671-672. However, this Court has also held that a plaintiff who sought payment for carpentry work performed on a defendant's home did not fall within MCL 339.2412(1) because the plaintiff worked only for wages and sought only reimbursement for materials furnished. *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). Accordingly, pursuant to MCL 339.2401(e), the plaintiff was not a residential maintenance and alteration contractor, and, therefore, he was not required to be licensed under the act. *Id.* at 480-481. David's situation is analogous to that of the plaintiff in *Wojas*, and, moreover, he was a member of the owner's family and occupied the home. Under MCL 339.2403(b), an owner involved in the construction of a structure for the owner's own use and occupancy is exempt from the act's licensing requirement.

Whether the act would apply to David is doubtful and, in any event, was not addressed or decided by the trial, and is not properly resolved on appeal. In a divorce proceeding, a trial court may take into account house payments made on behalf of the parties when determining the equity in a marital property. *Gates, supra* at 428. We find no error in the trial court's valuation of the house, which included equitable consideration of the \$60,000 debt.

IV

Defendant alleges error in the valuation of his 401(k) and in the award of \$20,000 to plaintiff based on a "speculative increase in value" of his pension plan and as compensation for alleged injuries previously disallowed by the court. We address these issues separately.

A

Defendant argues that the trial court erred in including his entire 401(k) value, \$131,834, in the marital estate, which ignores the premarital value of the 401(k).⁴ This issue must be remanded to the trial court for consideration because we are unable to determine from the record

⁴ We reject defendant's additional argument that the court overvalued the 401(k) by ignoring tax consequences and penalties in valuing the 401(k). Defendant failed to properly present this issue for review because it is not included in defendant's statement of questions presented. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391; 404; 628 NW2d 86 (2001). Moreover, it does not appear that defendant even addressed the tax consequences and penalties in making arguments to the trial court. The court may consider tax consequences and other inchoate expenses in distributing the assets if the parties have presented evidence that causes the court to conclude that it would not be speculation to do so. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993).

whether the court's failure to recognize the premarital value of defendant's 401(k) was an oversight or purposeful.

In its opinion, the trial court noted that it was valuing assets as of the date of separation, which the parties agreed was sometime around December 1, 2001. The undisputed value of defendant's 401(k) at the time of separation was \$131,834; however, evidence established that the premarital value of the 401(k) was \$14,725.25.⁵ In setting forth its reasoning for the property settlement, the trial court valued defendant's 401(k) at \$132,000 and calculated the division of the marital estate on an award of this entire amount to defendant. We find no apparent basis for the court's failure to account for the \$14,725.25 premarital value as a separate asset. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Accordingly, we reverse the award of the \$132,000 and remand for reconsideration. On remand, the court shall decide whether the property settlement must be adjusted to account for the premarital value of defendant's 401(k).

B

Defendant argues that the court erred in awarding plaintiff \$20,000 in consideration of defendant's pension benefits accumulated during the marriage and plaintiff's lost earning power related to a knee injury caused by defendant allegedly kicking plaintiff's knee. Given the overall circumstances of this case and the evidence presented, we find no basis for reversal of this award.

Regarding defendant's pension benefits, the trial court observed that it was "almost impossible to value as the court was given no information as to present values," but stated that it would "make an adjustment when distributing the assets." With regard to fault, the court found greater fault on the part of defendant, but noted that an adjustment would be made at distribution because a specific valuation for fault was impossible. Likewise, with regard to plaintiff's allegation of domestic violence, the court noted that plaintiff had not proven domestic violence by a preponderance of the evidence, but the evidence was clear that her knee was damaged as a result of an episode with defendant and the court would make an adjustment in the distribution of the property. In the property disposition, the trial court awarded plaintiff \$20,000, stating that "[d]ue to the lack of present valuations of the defendant's defined benefits increase, and lack of specificity of the plaintiff's earning power," it was awarding plaintiff an additional \$20,000.

We reject defendant's claim of error with regard to the additional award of \$20,000. The court otherwise divided the marital estate equally. The trial court concluded that exclusive of the unrecorded asset, plaintiff's medical requirements, "discrepancy (sic, disparity?) in earning power, and discrepancies in retirement increases," defendant owed plaintiff \$31,500, based on an equal division of the parties \$169,000 in assets. The award of the additional \$20,000 was supported by the evidence and properly based on relevant factors. *Sparks, supra* at 159-160.

⁵ We find defendant's reference to the September 1992 value misleading because the parties were married August 7, 1992 and the August 28, 1992 value was undisputed.

Evidence admitted at trial showed that on August 2, 1992, five days prior to marriage, defendant had vested benefits of \$608.79 a month, and as of January 1, 1997, defendant had reached his maximum available monthly benefit of \$880.37 a month. “The portion of the pension earned during marriage is clearly marital property” that is subject to award upon divorce. *Pickering v Pickering*, 268 Mich App 1, 8-9; 706 NW2d 835 (2005). However, in this case, the trial court did not distribute the pension and instead awarded the parties full rights to their respective individual pensions.⁶ Nonetheless, the court indicated that it would consider plaintiff’s entitlement to defendant’s pension, fault, and plaintiff’s knee injury in equitably distributing the marital estate.

Defendant has not shown that the award of \$20,000 was inequitable based on consideration of the pension benefits that accrued during the marriage, fault, and plaintiff’s knee injury, and we are not left with a firm conviction that the division was inequitable in light of the findings. “The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances.” *Gates, supra* at 423.

The court’s findings in support of the \$20,000 award are not clearly erroneous. We are not left with the definite and firm conviction that a mistake has been made. *Beason, supra* at 805. A distribution of the pension benefits would presumably have resulted in an award in plaintiff’s favor based on the evidence and the parties’ arguments.⁷ There was ample evidence and testimony concerning defendant’s physical assaults of plaintiff, and his alleged controlling and violent behavior involving plaintiff and her three children, to support the court’s finding of greater fault on the part of defendant. Fault and the conduct of the parties are clearly appropriate factors when determining property distribution. See *Sparks, supra* at 160. Testimony and other evidence, including plaintiff’s hospitalization record, supported the court’s findings with regard to plaintiff’s knee injury. Plaintiff testified that the knee injury affected her ability to work, resulting in lost wages. Further, because of the injury, she would likely be able to work only two more years and would have been able to work longer had she not been injured.

Defendant argues that the visiting judge who tried the case ignored the prior judge’s order denying plaintiff’s request to amend her complaint to add claims for personal injury and spousal support. We find this argument without merit, given the prior judge’s reasons for denying plaintiff’s motion to amend, and given the prior judge’s explicit recognition that the divorce trial would likely involve evidence of the alleged assault with regard to issues of fault. Fault and past conduct were relevant and proper factors to consider in determining property distribution in this case. See *Sparks, supra* at 158, 160.

Although the court’s manner of setting forth its determination with regard to the \$20,000 award was not as explicit as it could have been, the dispositional ruling was fair and equitable in

⁶ Evidence established that plaintiff had a monthly vested pension benefit of \$174.87 that had accrued during the marriage.

⁷ Plaintiff sought an award of sixty percent of defendant’s pension benefit. Defendant argued that if the court considered retirement benefits, the court should consider both parties’ benefits and consider them from the date of marriage to the date of separation.

light of the facts. *Draggoo, supra* at 429. A trial court is given broad discretion in fashioning its rulings in a divorce case. *Sparks, supra* at 158-159. Because we are not left with the firm conviction that the dispositional ruling was inequitable, it must be affirmed. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996).

V

Defendant alleges errors in the valuation of the marital real estate involving alleged costs for roof repair and debris removal presented by plaintiff, who was awarded the marital home. Because we are unable to determine from the record the extent of the errors, if any, we reverse the assessment of these costs and remand this case to the trial court for a determination whether defendant is entitled to an adjustment in the property settlement on the basis of these alleged errors.

A

Defendant argues that the trial court erred in valuing the marital real estate by summarily ignoring substantial evidence. He contends that the trial court's valuation was erroneous because the court factored roof repair and debris removal costs into the appraisal value of the marital home, and also charged the same repair costs as debts in dividing the marital estate, resulting in a double credit to plaintiff. We find no clear error with regard to the court's valuation of the marital home at \$200,000. However, we are unable to determine from the record whether the roof repair and debris removal costs were twice factored into division of the marital estate,⁸ and if so, to what extent. We therefore remand for the trial court to determine whether defendant is entitled to a credit with respect to either the cost of repairing the roof or the cost of removing debris. If so, the trial court shall adjust the property settlement accordingly.

Both parties submitted written appraisals of the marital home as evidence of the home's value. Both also presented the expert testimony of their appraisers. Plaintiff's appraisal valued the marital home at \$185,000. Defendant submitted two appraisals: \$240,000, as of March 2002, and \$242,500, as of December 2003. Plaintiff testified that the septic tank was in disrepair and that the estimated cost of repair was \$18,000, that she paid \$12,100 to repair the roof, and that she received two estimates, \$3,800 and about \$5,000, to remove debris from the property. Defendant's appraiser admitted that he did not take into account any septic tank problems and also admitted that his appraisal would be reduced by \$12,000 if that was an accurate amount to repair the roof. In its opinion, the trial court valued the parties' marital home at \$200,000 reasoning that it believed defendant's "appraisal [was] excessive in that it d[id] not take into account the problems with the property[, which included] garbage on the property, and the general structure of the house."

⁸ We are unable to determine the extent to which the court reduced the value of the home in consideration of plaintiff's testimony concerning the cost of repairing the roof and removing debris from a ditch on the property.

The \$200,000 valuation fell within the range established by the proofs. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994) (“[W]here a trial court’s valuation of a marital asset is within the range established by the proofs, no clear error is present.”). Likewise, the trial court’s determination of debris removal costs of \$5,000 was supported by the evidence. However, the trial court subsequently reduced the home’s equity by imposing a \$5,000 debt on the marital home for cleaning up the debris, which was a credit to plaintiff since she was awarded the marital home. It is unclear whether the “general structure of the house” noted by the court included a consideration of the cost of roof repair. If so, then the property settlement must be adjusted because the court also reduced the home’s equity by imposing a \$12,000 debt on the home for roof repair, which was a credit to plaintiff in the division of the marital estate.

B

Defendant also argues that the trial court erred in reducing the equity by \$12,000 for roof repair costs because he discovered, following trial, that plaintiff essentially committed fraud by failing to disclose at trial that she had received insurance reimbursements totaling over \$7,000 for roof repair costs. After discovering this evidence, defendant filed an amended motion to stay the divorce judgment. In response, plaintiff admitted that her insurance company paid \$5,800 to Purofist (the repair company) minus \$460 deductible. She also claimed, however, that she paid her son \$5,000 to reinforce the roof and extend eaves and that she paid \$7,495 to Purofist for roof repairs. Defendant admitted that he did not have proof that she failed to pay Purofist this money. Because defendant’s insurance reimbursement claim directly relates to the redetermination of the credit for roof repair costs discussed above, any reduction in the alleged \$12,000 cost may be considered by the court on remand if the trial court determines a reduction is appropriate.

VI

Defendant argues that the trial court erred in finding that defendant had received an undisclosed \$75,000 from their feed selling business during the course of their marriage. We disagree. On appeal, we give special deference to a trial court’s factual findings based on witness credibility. *Draggoo, supra* at 429.

Defendant explained below that some of the proceeds from the sale of feed would be put in the checking account and that the rest would remain in a safe. Plaintiff suspected that defendant was taking feed sale proceeds without her knowledge and further testified that she was unaware that money was being kept in the safe. She accused defendant of taking \$205,000 to \$300,000 of the proceeds over a period of time and claimed that she did not have the combination to the safe. Defendant admitted that the parties collectively took approximately \$75,000 of unreported income from the proceeds, but asserted the money was spent on the marital home and was used to pay for work done on the farm. The trial court found that plaintiff had not proven how much money was unreported, but found that plaintiff had no knowledge of the unreported income. The trial court’s findings of fact were not clearly erroneous given the testimony and defendant’s own acknowledgement of unreported income of \$75,000.

VII

Defendant next argues that the trial court erred in giving the parties' credit for the assets they each brought into the marriage. We disagree.

A "trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves, supra* at 493-494. Ordinarily, marital assets are subject to division, but separate assets may not be invaded. *McNamara, supra* at 183. Generally, assets earned by a spouse during the marriage are generally considered marital assets, *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997), while separate assets include property owned by one party prior to a marriage, see *Lee v Lee*, 191 Mich App 73, 77-79; 477 NW2d 429 (1991). An appellate court should consider the intent of the parties when separate premarital property is commingled for joint purposes during the course of the marriage. See, e.g., *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951).

The testimony and evidence supported the court's findings with respect to the parties' separate assets and those assets that comprised the marital estate. The trial court properly considered and determined the extent to which the parties were entitled to separate assets.

VIII

Finally, defendant argues that the trial judge should be disqualified from presiding over any proceedings on remand. Defendant asserts that disqualification is necessary because the trial judge ignored the prior judge's order, made erroneous factual findings, and failed to equitably distribute the marital assets. We disagree. A case should be assigned to a different judge if it is unreasonable to expect a trial judge, given the judge's handling of the matter, to be able to disregard his previously expressed findings without substantial difficulty. *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998). However, a trial judge is presumed to be impartial. See *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The trial court's handling of the case does not demonstrate an inability to fairly revisit this matter on remand.⁹ *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001).

IX

We reluctantly remand this case for a determination whether defendant is entitled to an adjustment in the property settlement to compensate him for the premarital value of his 401(k) (\$14,754.25), and whether an adjustment to the property settlement is warranted with respect to

⁹ We decline to consider defendant's argument that he is entitled a credit of \$3,000 on the basis that the value of the boat and motor was erroneously added to the value of defendant's assets in calculating the property settlement. Defendant failed to properly present this issue for review because it is not included in defendant's statement of questions presented. *Bouverette, supra* at 404.

alleged error in considering roof repair costs and debris removal.¹⁰ In all other respects, we find no error requiring reversal with regard to defendant's claims.

This was a highly contentious, drawn out, divorce case in which the trial court repeatedly sought to clarify the parties' exact positions on each specific disputed issue, of which there were many. Any lack of specificity in the trial court's decision results in large part from the multitude of disputed points and the evidence presented. The trial court repeatedly interrupted the trial proceedings to seek needed clarification of the parties' positions concerning the valuation of assets. Defendant, in particular, on various occasions failed to respond with adequate specificity to the court's requests.

The record indicates that the trial judge took great pains to understand the parties' positions, hear the evidence, and render an equitable decision. Both judges involved in the proceedings below are retired. Although we remand this case for further determination by the trial court, we strongly suggest that the parties engage in settlement discussions or otherwise mediate a resolution of the issues on remand without the need for additional hearing and decision by the trial court. Given the acrimonious nature of the trial, involving testimony from children of each party, in our view, it would be a further injustice to the families, as well as an unnecessary burden to the court, for the parties to engage in additional court proceedings to resolve the remanded issues.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff

¹⁰ We make no determination concerning the amount of an adjustment, if any, on remand with respect to these claims, including the 401(k), i.e., the trial court may determine that an adjustment is due for the entire amount, a portion thereof, or none at all.